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PER Harary OFFICE CDC

FADRC FOI CASE NO. 7902490

AMEMBASSY,

TOKYO.

A-658 March 4, 1953

FCN Treaty. Embassy telegrams 2816 of February 27 and 2820 of February 28.

There follows a confirmation text of the wording offered in reply to Embtel 2816, as addendum to Protocol 4:

"Furthermore Japan shall not be obliged by the terms of that paragraph to accord to enterprises of nationals and companies of the United States of America of the types mentioned in the first sentence of paragraph 2 of Article VII more favorable treatment than the State in which such national is domiciled, or pursuant to whose laws such company is organized, accords to enterprises of nationals and companies of Japan."

It is proposed that the above wording be added to Protocol 4 because it relates, as does the existing language of that Protocol to paragraph 4 of Article VII. The wording transmitted in Deptel 2057 of February 20 remains also authorized for alternative use, at Embassy's discretion.

By way of comment, the DEPT agrees that wording along the lines above set forth would generally be superior to that of Deptel 2057, if acceptable to the Japanese, inasmuch as it would be evidently limited to the initial entry phase of investment, would probably create fewer problems of application, and would avoid having specifically to single out banking; but the Department would not recommend that it be insisted on over the 2057 version, if it should transpire that that course would provoke a controversy which delayed conclusion of the negotiations.

The Department's objection to the precise wording suggested in Embtel 2816 lay in the approach of formulating an exception to most-favored-nation treatment in terms of

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national treatment. This approach would appear to involve a conceptual inconsistency, and possibly to cast a cloud on the meaning and significance of the second sentence of VII(2). There was one point in the explanatory material transmitted in Embtel 2816, moreover, which was not entirely clear: namely, the remark that "m-f-n treatment might be regarded as a ceiling applicable to U.S. nationals while residents of some States would be accorded less favorable treatment." In the Department's view, a MFN clause is a floor, rather than a ceiling, and the treaty definition is designed to convey that idea (see words "no less favorable" in Article XXII, para. 2). The fact that citizens of one State might receive better treatment than those of another is merely the price to be paid for a "de facto reciprocity" formula designed to maximize American rights abroad without upsetting State legislation and to avoid having the treaty rights of all Americans reduced to the least common denominator of the most restrictive State. The responsibility and initiative for the situation would rest upon the individual States, which would remain free to ameliorate it as they saw fit.

As to Embtel 2820, the reason why Dept would not like to reduce Article XVIII, paragraph 2, to merely its first sentence is that thereby the provision would be left either too weak or too strong. That is, either it would have the appearance (especially when compared with the full provision as found in previously signed treaties) of being a meaningless exhortation designed to conceal lack of agreement with Japan on the matter, and apt to be criticized before the Senate on this count by the NPTC; or, if it were construed to constitute a firm legal commitment, it would lack the necessary reservations set forth in the third sentence. It would not be a good precedent, and the Department would rather see the entire provision deleted if the Japanese Government is unable to accept it substantially in full.

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(It might be said that another difficulty in retaining the first sentence by itself, as now phrased, is that, without the second sentence, it would seem to say, inter alia, that government enterprises should have all rights a private enterprise has--including perhaps access to the patents of a private business. It is not the purpose of the treaty to assert a principle of this sort).

Further explanation of Department's thinking regarding points in issue (those numbered 2 and 4 in Embtel 2664), and the negotiation as a whole, is contained in another airgram now in course of being forwarded, and which should reach Tokyo concurrently with or before the present one.

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